

## IDEA, SECTION 504 & THE STUDENT RECEIVING FAPE AT HOME

Presented by

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**A note about these materials:** These materials are not intended as a comprehensive review of all IDEA or Section 504 rules, dynamics, or implications arising from the public school's provision of educational services in the student's home. Instead, the author has attempted to identify a variety of areas of concern to assist public educators as they provide FAPE to students with disabilities in that setting. While numerous cases and OCR letters of finding are referenced in these materials, no effort is made to address or summarize every issue arising from every case or letter. Instead, bits and pieces were chosen to illustrate dynamics and provide answers to discrete questions. References to the U.S. Department of Education will read "ED." These materials are not intended as legal advice, and should not be so construed. **State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.**

**A quick note on terminology:** Despite the IDEA utilizing the term "home instruction" to describe a placement on the continuum, some states replace the term with "homebound instruction," and worse, *use the same term* to describe instruction at home available on a temporary basis to students who are not special education eligible. As the terms are used interchangeably in the cases, the reader is asked to look to the context of the discussion for clarity.

**When a student is educated in the traditional schoolhouse...** It's easy to take for granted the resources and expertise that are readily available in the traditional brick-and-mortar school. When students with disabilities are served there, educational professionals and service providers, instructional resources, a safe and ordered learning environment, and even age-appropriate peers are likely close at hand. While providing instruction elsewhere or through cyberspace can benefit a student with a disability, it requires rethinking the way services are provided to the student, from how to provide services and accomplish legal compliance to how access to nondisabled peers is facilitated. These materials attempt to analyze some of those concerns.

### I. Should the student receive educational services from the public school at home?

#### A. Background

**1. Home instruction for IDEA-eligible students.** "Home instruction" is a term of art, used by the IDEA regulations to refer to a special education instructional arrangement or setting. It is not to be confused with the phrase "home-based" services, which typically describes a student, who while confined to his home, is provided access to materials, assignments, etc., but gets no direct instruction. The federal regulations specifically identify home instruction as part of the continuum of placements for the IDEA-eligible student. 34 C.F.R. §300.115. State law and regulation will likely provide parameters for delivering instruction at home under the IDEA. Due to the variety of rules among the states, those rules are not discussed here. Consult your school attorney to discuss the impact of state rules.

Home instruction comes with serious least restrictive environment (LRE) repercussions. **"Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children.** For that reason, home instruction should

be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery.” *DOE Commentary to Subpart E, §300.551* (1997 IDEA Reauthorization)(emphasis added). Similarly, the 9th Circuit found that “Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions.” U.S. Department of Education, *Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired, aqi*, and *Department of Educ., State of Hawaii v. Katherine D.*, 555 IDELR 276, 727 F.2d 809, 818 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117, 112 LRP 25887 (1985).

**2. Section 504 & the student served at home.** Home instruction, or some similar label, is also used to describe services at home for Section 504-eligible students. Note that under Section 504, a student’s physical or mental impairment that requires him to be educated at home, while not automatically creating Section 504 eligibility, likely triggers the school’s duty to refer the student to Section 504 for evaluation. See, for example, *Lourdes (OR) Public Charter School*, 57 IDELR 53 (OCR 2011), where, lacking appropriate staff and a health plan to address the medical needs of a student with diabetes, the school placed the student on homebound instruction. OCR determined that this was a significant change of placement for a student because of a physical impairment, requiring a Section 504 evaluation first. In essence, the school suspected disability and the need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student on homebound instruction. “Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPCS failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a).” See also, *Logan County (WV) Schs.*, 55 IDELR 297 (OCR 2010)(OCR determined that the school’s placement of the student on homebound was a significant change in placement “as it changed the type, nature, length and duration of the education program he received when not on homebound instruction” and should have been preceded by a Section 504 evaluation).

*A little commentary:* OCR’s position creates a wrinkle in state and school policies/procedures that attempt to address home instruction outside of the procedural safeguards of Section 504. While not all students confined to the home and receiving services there will be Section 504 eligible (or IDEA eligible, for that matter), the school’s decision to serve students at home because of a physical or mental impairment means (at least to OCR) that such students get to home instruction via a Section 504 evaluation. *But see, Boling (TX) Indep. Sch. Dist.*, 110 LRP 48659 (OCR 12/19/09)(OCR finds no violation where homebound was provided without a Section 504 evaluation due to school’s belief that the student’s medical condition was temporary).

## **B. The need for home instruction: Documenting the student’s impairment + confinement to the home**

While the exact requirements under state law for homebound services will differ from state to state, as a general rule, state laws tend to include some common elements. First, the student must be confined at home or hospital for a given number of days. Second, the confinement must arise from an impairment or a physical or mental health issue. Third, some sort of medical documentation of the confinement must be provided to the school.

The Wyoming Statute at §21-4-402 provides that:

(a) The board of trustees of each school district shall offer homebound instruction for each pupil in the district who is hospitalized or homebound for more than one (1) week because of injury or illness.

(b) The board shall also offer homebound instruction for each pupil in the district who is hospitalized or placed in a state accredited or state certified treatment facility for more than one (1) week in a hospital or facility located in another Wyoming school district because of injury or illness. The board shall either provide instruction directly or contract with the school district in which the pupil is hospitalized or placed in a facility to provide this instruction. This subsection does not apply to pupils who are hospitalized or placed due to a mental, physical or psychological handicap and who are receiving educational services under W.S. 21-2-501 [the requirement to provide FAPE].

## 1. Documentation of the student's medical condition

**Doctor's notes and home instruction.** A common requirement in state law is that a medical doctor certify that the student, because of a medical condition or impairment, is unable to attend school. *See, for example, Bellingham Pub. Schs.*, 41 IDELR 74 (SEA MA 2004)(addressing Massachusetts law: "at a minimum, the school district must receive a physician's signed statement which includes 'the medical reason(s) for the confinement' to the home."); *Los Angeles Unified Sch. Dist.*, 54 IDELR 269 (SEA CA 2010)(Addressing California law: "In order to receive home instruction, a student must have 'a medical report from the attending physician and surgeon ... stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report shall include a projected calendar date for the pupil's return to school.'"). Students can be confined to the home for any number of disability-related reasons. A few examples:

**Post-concussion syndrome.** *Mt. Zion Unitary Sch. Dist.*, 111 LRP 51317 (SEA IL 04/04/11). While "most people who are diagnosed with a concussion recover relatively quickly after the trauma with quiet and rest, people with PCS have concussion symptoms which continue for an extended period of time." The student's doctor testified that both physical and cognitive stimuli can exacerbate his condition. Consequently, "the stimuli of a regular classroom and school setting would almost certainly cause a deterioration of Student's physical condition given the stimuli of a normal school environment." Finding that there is no safe way to educate the student in any classroom with other students and no accommodations can reduce the risk (with the exception of removing all other students from the classroom), "the only reasonable placement at this point in time is a homebound placement."

**Poor body temperature regulation.** *New Jersey Dep't of Educ. Complaint Investigation C2012-4341*, 59 IDELR 294 (N.J. Sup. Ct. App. Div. 2012). The student "has a neo-natal encephalopathy with severely compromised post-natal growth and neurological development. Because of his brain defect, T.S. has poor temperature regulation and must be in an environment that is 77 degrees Fahrenheit or higher so that his core body temperature remains about 96.5 degrees." The district argues that home placement is inappropriate because it is not the LRE, despite a finding by the State Office of Special Education that "the home was the most controlled/controllable environment." "The district states that T.S. was initially placed at the Children's Therapy Center and removed from that program because of medical concerns, not because the program was deemed inappropriate. However, as the record indicates, the Children's Therapy Center program was deemed inappropriate because that program could not meet T.S.'s need for temperature stability." There being no evidence that the student's medical health can be maintained in a less-restrictive setting, the district is ordered to provide 10 hours per week of home instruction.

Reported cases and OCR letters of finding identify any number of impairments that may, in the case of a particular student, prevent the student from attending school: leukemia (*Yancey (NC) County Schools*, 51 IDELR 23 (OCR 2008)); severe asthma and allergies (*Great Falls (MT) Public School District*, 48 IDELR 200 (OCR 2006)); sensitivity to colognes, perfumes, and fragrances (*Zandi v. Fort Wayne Community Schools*, 59 IDELR 283 (N.D. IN. 2012)); aplastic anemia (*Georgetown Independent School District*, 45 IDELR 116 (SEA TX 2005)); variety of serious physical injuries from a motorcycle accident (*Bradley County (TN) Schools*, 43 IDELR 143 (OCR 2004)); medically fragile student easily susceptible to communicable disease (*DeKalb County Central United School*

*District*, 111 LRP 51791 (SEA IN 12/03/10); and cystic fibrosis (*Oneida (NY) City School District*, 54 IDELR 173 (OCR 2009).

**2. Determining whether the student is confined to the home.** A simple way to ask if the student is confined to the home: Would any aid, service, or accommodation allow the student to attend school? *Georgetown Ind. Sch. Dis.*, 45 IDELR 116 (SEA TX 2005).

“The evidence demonstrates that for the periods of time during the 2003-04 school year that JK was on homebound status, the nature and severity of his disability were such that he could not be educated in a public school setting. JK’s platelet counts were low throughout the school year, leading to increased incidence of illness, and when he returned to school for a two-month period in fall 2003, JK did indeed become sick, with various respiratory symptoms and walking pneumonia. The homebound needs assessments completed by JK’s doctor represent that he could not attend school due to his suppressed immune state; the ARDC [IEP Team] properly concluded, based on this information, that a homebound placement was the least restrictive environment for JK. No evidence exists to suggest that Respondent could have provided any aid, service, or other accommodation that would have allowed JK to attend school without getting sick.”

**Does the IEP team believe the student is confined to home?** *South Washington County Indep. Sch. Dist.* #833, 113 LRP 906 (SEA MN 01/11/12). Alleging safety concerns following an incident with another student at school, the parent claimed that the student was too upset to come to school and would remain at home. Later, the parent demanded that the other student must be removed from any classes the student would be attending, or the student would not return. Eventually, the school agreed to homebound (while stating in the short-term IEP that the district believed the school continued to be a safe placement for the student). The IEP indicated that the parent “could terminate the short-term IEP at any time by notifying the District in writing that she wanted her student to return to the school.” Confusion as to the amount of services required resulted in this complaint. The administrative officer found some problems, one germane to these discussions.

“The Complainant unilaterally removed the Student from school and was unresponsive to the District’s attempts to meet with her. Although the District proposed a homebound IEP, it is not clear that the District believed that the Student required homebound instruction. Rather, it is reasonable to infer that the District was trying to accommodate the Complainant’s unilateral removal of the Student rather than refer the Student as truant. The change of placement required a consideration of the Student’s needs and due process.... The District violated 34 C.F.R. § 300.324 when it failed to develop a short-term IEP based on the unique needs of the Student.”

*A little commentary:* The district’s efforts to serve the student at home due to the parent’s position on the safety of the school overlooked the obvious question of whether the student could be educated in a less restrictive environment with supplementary aids and services. The nature of the school’s offer of homebound until the parent was ready to send the student back (and the telling language on the IEP that the district believes the school is safe/appropriate) indicate that homebound was not appropriate here, but was provided to avoid truancy actions. No impairment confined the student to the home. A final note: Where the reason for confinement is student or parent fear for safety due to harassment or bullying, part of the school’s efforts must be steps to ensure that incidents do not recur, and that harmful effects are remediated. In making these decisions, OCR warns “not to penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target’s educational program (e.g., not requiring the target to change his or her class schedule).” *Dear Colleague Letter*, 55 IDELR 174 (OCR 2010), p. 3.

**No homebound is appropriate when the student isn’t confined to the home.** Allegations of home confinement must be viewed in the context of other activities engaged in by the student both during and outside of school hours. *See for example, Calallen Indep. Sch. Dist.*, 25 IDELR 1017 (SEA TX 1997)(“Some students need continuous homebound services. John is not among them. One is hard

pressed to justify continuous homebound services for a student who drives the family car, goes out on dates, and regularly participates in other activities outside the home.”); *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013)(“Outside of school Student is not restricted to home. Student goes to the local shopping mall with friends, McDonalds, and other social gatherings. Student enjoys swimming and playing soccer.... Student appears robust and healthy and seems to engage in activities involving mold, pollen, and other people when the activity suits student.”); and *Bellingham Pub. Schs.*, 41 IDELR 74 (SEA MA 2004)(“Student testified that he regularly leaves his home, particularly after the end of the school day. He described various things that he typically enjoys doing outside of his home within the community—for example, ‘hanging out’ with his many friends, watching football games, seeing his girlfriend, driving a car (he has his learner’s permit).” “Parents would not consent to home tutoring being scheduled after school hours, because the tutoring would then interfere with Student’s spending time with his friends. The inescapable conclusion is that Student is not, for any reason, confined to his home.”). *See also the related discussion below on home instruction students participating in extracurricular activities.*

*A little commentary:* A common problem arising in these situations is a doctor’s note that indicates the student is confined to home, but evidence indicating that the student appears to function without any such restriction. In these situations, while the IEP team can certainly conclude that homebound is inappropriate, it is nevertheless faced with the problem of a student who may not want to return to school, a parent unable or unwilling to make him, and a doctor supporting nonattendance. As the school must provide FAPE somewhere to the eligible student, the school faces some difficult choices, including: (1) IEP team action returning the student to school. This action could result in a due process filing and a hearing officer weighing the doctor’s opinion on confinement against the evidence of the student’s outside activities OR the student’s refusal to attend and mounting absences, which under state law, may require truancy filings and a truancy judge ultimately weighing the issues; or (2) Provide services in homebound despite the IEP team’s belief that the home is not the LRE. For a student uninterested in school, service providers may find the student unavailable, uncooperative, or unconcerned about instruction. These situations can require a great deal of attention and resources to resolve. Schools should approach these thorny situations with the help of the school attorney.

**Is she confined if her needs can be met in a private school now, and in public school next year?**

The 9th Circuit concluded that the school’s offer of homebound services consisting of 1.5 hours of speech therapy and 40 minutes of parent counseling a week (and no academic instruction) was not FAPE. The school argued that the student’s medical needs created demands that it could not meet in the school. The student had cystic fibrosis and tracheomalacia, which required a tracheostomy tube to allow the student to breathe. The school’s argument was undermined by the student’s success at a private school where her mother placed her after rejecting the offered homebound. Further undermining the district’s claims was the district’s offer of an IEP at the public school for the following year. Agreeing with the District Court, the 9th Circuit found that homebound instruction was not the LRE, and was thus inappropriate. *Department of Educ., State of Hawaii v. Katherine D.*, 555 IDELR 276, 727 F.2d 809, 818 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117, 112 LRP 25887 (1985).

**No home instruction required when, with Section 504 supports, the student can be taught at school.** *Brado v. Weast*, 53 IDELR 316 (D. Md. 2010).

“Molly, to be sure, suffers from chronic pain and fatigue which likely inhibit her ability to concentrate and to complete tasks. The record is clear as to her need for frequent breaks, adjusted workloads, alternative test scheduling, and personalized instruction. The point, however, is that these modifications to Molly’s instruction can all be obtained through Rehabilitation Act accommodations. 29 U.S.C. § 794. Both the medical expert testimony as well as the educator testimony, as reviewed by the ALJ, indicate that Molly requires only accommodations. Not one HHT [Home Hospital Teaching Program] educator witness testified that Molly required special education. Nor did the psychological or the educational assessments that Molly underwent in 2006

indicate a need for HHT. While the medical doctors and psychologists all agree that Molly suffers from some sort of pain disorder, with the exception of Molly's primary care physician, Dr. Foxx, no medical expert suggests that Molly required HHT. Although Molly may have been provided with HHT for two years, the record does not establish that the earlier determinations by the IEP teams were well grounded."

*A little commentary:* The case makes the point that not only does the student not need instruction at home (as supports at school can adequately address her needs in a less-restrictive setting), but the services she requires are not specially designed instruction, and are available under Section 504.

**Homebound for a student with weeks of disability-related absences? Not necessarily.** *Mansfield Indep. Sch. Dist.*, 28 IDELR 900 (SEA TX 1998). In this Texas case, the hearing officer was presented with a student with ADHD and asthma that qualified him under the IDEA as Other Health Impaired (OHI). Although the decision alludes to a minor learning disability, the student was enrolled in all regular classes and was performing well. The parent was concerned about the student's absences arising from asthma. In the last year, the student had missed four weeks of school, two to three days at a time. The absences were spread out over the entire school year. On those days, his asthma was especially strong, resulting in fatigue, wheezing, a tight chest and difficulty breathing. His teachers report that upon returning to school, he has always been able to quickly catch up with his make-up work. The parent demanded that the IEP include homebound instruction whenever he was absent for more than three days. The hearing officer found no need. "Petitioner's request for homebound services is not justified or reasonable. While Timothy's absences due to illness are unfortunate and appear to be somewhat excessive, the duration of each absence is usually only two to three days. Moreover, Timothy appears to be able to make up any missed work after he is able to return to school. Each of Timothy's teachers appears to be willing to assist Timothy in the completion of work missed due to his absences." In short, the parent's request for homebound was denied because "there is no concrete basis to change the educational plan under which Timothy appears to be flourishing." That's hearing officer-speak for "the student has no educational need for more restrictive homebound services."

**What if the student is not *completely* confined to the home?** *S.P. v. Fairview School District*, 64 IDELR 99 (W.D. Pa. 2014). To address the needs of a Section 504 student with mounting absences due to refractory migraine headaches, the district attempted, with limited success, to change schedules and otherwise accommodate the absence. When those efforts failed, the district provided a hybrid program consisting of in-home cyber school courses for credit with the option to attend school when the student's condition allowed. The student could attend or audit regular education classes for no credit, and participate in all extracurricular activities. The district court found that the placement was appropriate. *See also, Traverse City, below.*

**Student confined due to diet?** *A.K. v. Gwinnett County School*, 62 IDELR 253, 114 LRP 7844 (11<sup>th</sup> Cir, 2014)(unpublished). The parent of a student with autism provided the student with a strict diet that required nutritional supplements every forty-five minutes. The parent requested homebound for a three-month period so that the student could "be provided the diet in a low stress environment." The student was not under regular medical care, nor was the diet medically required. The ALJ and court agreed with the school as there was no medical basis for homebound. Note that the dispute began when the district proposed to place the child in a severe autism unit. The parent disagreed, and requested homebound services.

**3. The role of doctors in determining need for home instruction.** Even when the doctor's note is required by state law, the doctor does not make the ultimate determination of placement or LRE. A few cases and OSERS guidance look at how the doctor's opinion is utilized in the placement decision.

**The IEP team makes the call.** *Questions and Answers on Providing Services to Children with Disabilities During the H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009). "It has long been the

Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted."

*See, also Marshall Joint Sch. Dist. #2 v. C.D.*, 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010)("a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs.... **But a physician cannot simply prescribe special education**; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]").

**A diagnosis isn't enough—why is the student confined to home?** *Bellingham Pub. Schs.*, 41 IDELR 74 (SEA MA 2004). When asked by the district to explain why a student was confined to the home and in need of homebound services, the doctor responded by listing the student's impairments. Student "has severe learning disabilities (reading, expressive and written language, and math), and also suffers from ADHD, ODD (Oppositional Defiant Disorder), Asperger's Syndrome, a mood disorder that has many of the hallmarks of bipolar illness, anxiety disorder, and obsessive-compulsive disorder." Neither the school district nor the court were satisfied.

"Nothing within Dr. Henry's original submission of May 16, 2003 or in his more recent letter of January 23, 2004 explains how any of Student's diagnoses impacts upon his ability to leave the home and receive educational services at a school. Dr. Henry has provided no basis for distinguishing Student (and his diagnoses) from all of the students with these same diagnoses who receive their educational services within a school setting. In other words, the diagnoses, without more, do not explain why Student must remain at home."

**Why doctors don't make the homebound placement decision alone....** Not knowing the educational options and resources available to the school, the doctor may simply think that homebound is the only possible solution. A case from Texas provides insight into the analysis that goes into educational placement decisions, and why these decisions are made by an IEP team.

"Dr. [ ] is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. [ ] is unfamiliar with the term 'IEP' and does not know the difference between homeschooling and homebound placement. Dr. [ ] has never visited Student's home or school, or talked to anyone from Student's school. Dr. [ ] was unaware that Student's parent had refused to provide Student's school with her consent for the school to speak with Dr. [ ] about his treatment of Student. Dr. [ ] has provided no information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity.... The standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards." *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013).

*See also, Brevard County Sch. Bd.*, 109 LRP 56512 (SEA FL 08/12/09)(With respect to a doctor's opinion on the issue of returning a medically fragile student with autism from homebound to a small classroom in his neighborhood school, the hearing officer wrote, "Petitioner's physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner's physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance.").

**A doctor's "request" for homebound.** *Rockford Sch. Dist. #205*, 108 LRP 42815 (SEA IL 06/26/08). *Rockford* is instructive on a variety of common issues. A lengthy excerpt from the case

provides the factual support for the hearing officer's decision to reject homebound instruction as an option for this student with autism.

**“The note thus refers to the student’s autism, but that is a disability with which the student had long suffered, and it had not prevented him from attending school.** The note also refers to the student as ‘having been more depressed and not comfortable at school,’ which are not illnesses requiring absence from school at all, but merely descriptive of the student’s moods at school. It also refers to the student’s ‘current illness,’ but what this ‘illness’ was—and whether it is any different from the student being ‘depressed and not comfortable at school’ or different from the student’s ‘autism’—is not identified or described or otherwise documented. **This officer finds, in any event, that the February 14 note from Dr. Danko did not document any illness or condition that required the student to be absent from school for even one day, much less for more than four months.** In any event, it is extremely doubtful that C.S. suffered from any illness requiring his extended absence from school (i.e. his absence from school for other than during the first week or so of February 2008). The lack of any medical documentation of such an illness—submitted to either the District or ‘retroactively’ at the hearing to this officer—supports that conclusion. So does the mother’s own testimony, for while the matter of her son’s medical treatment was raised with her at the hearing, she did not testify that she even sought professional medical assistance for C.S. at any time after February 1, 2008 (other than from Dr. Danko, on February 7, 2008). **Yet, if her son had truly ... suffered from an extended illness during the last four months of the school year, serious enough to keep him out of school, this officer would expect her to have sought just such assistance, and been eager to testify about it.**

Petitioners solicited the February 14 letter from Dr. Danko for a different purpose than to provide medical documentation of C.S.’s illnesses requiring C.S.’s absence from school. The letter is thus framed in terms of a joint request for homebound instruction. It says that R.S. had ‘requested’ of Dr. Danko a recommendation for homebound instruction. Then, Dr. Danko, implicitly invoking C.S.’s ‘autism,’ his ‘depression and [dis]comfort[ ]’ at school, and his unspecified ‘current illness,’ himself requests that C.S. ‘receive homebound services for the remainder of the year.’ **Whether this request is based on the independent judgment of Dr. Danko that the provision of such services was medically appropriate, or he was merely being responsive to R.S.’s request to him, is unclear from the text of the letter, and Dr. Danko did not testify in the matter, so this officer has no way of knowing what his views are on the matter.”** (Emphasis added.)

Upon review of the data, the hearing officer concluded that the school’s IEP was appropriate and that “For the District to have permitted homebound instruction for the student, when the nature and severity of his disability, as medically documented, did not even remotely suggest that he could not achieve satisfactory educational progress in the regular classroom, with the assistance of his assigned paraprofessional and the provision of other services, would have violated IDEA.”

*A little commentary on the truancy problem:* The case, while an extreme example, does illustrate the dynamic of parents who either are unwilling or unable to get the student to school and the impact of school demands that parents provide medical documentation for purposes of compulsory attendance. The possibility of truancy filings in the absence of documentation prompted the parent to claim that the student was enrolled in another school. Wrote the hearing officer: “The mother committed a fraud upon the District, and did a profound disservice to her son educationally, by purporting to withdraw him from the Rockford Public Schools in order to enroll him in Education Choice School, when there was no school by that name, but only a mail box drop at the address shown for the school.”

A problem schools encounter in this situation is that the school believes that the student should attend and plans the IEP accordingly, but the parents refuse to send the student, relying on the doctor’s recommendation for home instruction. Should the school pursue truancy when the student’s attendance so requires, a judge may be less than sympathetic to the school’s position in the absence of medical data that the student can actually attend. To better prepare for such a situation, the school will



need to document why, despite the doctor's recommendation, the student is able to attend. For example, what does the student do outside of school hours? Does he have a job, go on dates, spend time in the community? See *Calallen, Plano, Bellingham, supra*. This type of data can certainly raise a court's suspicions as to the medical need for the student to be taught away from school.

**No health-based need for home instruction due to immune deficiency.** *Stamps v. Gwinnett County Sch. Dist.*, 59 IDELR 1 (11th Cir. 2012), *cert. denied*, 112 LRP 54652, 133 S. Ct. 576 (2012). The school's refusal to educate three siblings at home, and creation of school placements for them was upheld by the court based on good data with respect to the impact of the students' impairments.

"The administrative law judge did not clearly err in finding that the programs devised by the district are reasonably calculated to provide the children an adequate education in the least restrictive environment and that the children are capable of attending public school. Dr. Battle's testimony did not establish that H.S., S.S., and J.S. had to be educated at home because they had a nonspecific immune deficiency. Battle testified that the children's immune deficiency did not require preventative treatment, they did not have a 'bonafide primary immune deficiency,' their immune systems '[would] improve just like anybody' with age, and the children had not been sick in several years. Battle's testimony was consistent with the opinion of an expert in pediatric infectious diseases who, after reviewing the children's medical records and speaking briefly with Battle, found that **the children 'would have the same probability of getting sick' as other children** and that, because 'they did not have any severe or unusual infections,' they should not have 'any restrictions on their socialization activities, be it school or going to community functions.'" (Emphasis added.)

**Who has the duty to evaluate the student's need for homebound?** IDEA tasks the school with the duty to provide appropriate evaluation. That duty is not one that the school can delegate to the parents, even when homebound is at issue. Homebound demands can create difficult evaluation dynamics, especially when the school does not have access to observe the child, and the doctor's recommendations do not appear to satisfy the IEP Team's concerns. Consider the federal district court's ruling in *Rodriguez & Lopez v. Independent School District of Boise City, No. 1*, 63 IDELR 36 (D. ID. 2014), where parents of a student with autism kept him home, missing months of instruction, due to concerns about the school environment and allegations of an employee kicking the student on the bus. The IEP Team refused the parent's request for homebound, since the student was not confined to home due to illness or accident. The result was a student not receiving services. Wrote the court: "During his absence, C.L.'s academic advancement was not just minimal or trivial; it was nonexistent. Meanwhile, BISD had a continuing duty to provide FAPE to C.L." The school's position, wrote the court, was that the student should immediately return to school for services.

The parents provided data that an immediate return was inappropriate. For example, the student's doctor recommended that the student receive homebound due to his fear of returning to school. When asked by the school to identify the benefits of homebound to the student, the doctor wrote

"Nothing, other than I thought that is what the family and the school were desiring until his IEP, behavior intervention plan, and the medication plan were in place such that his disruptive/concerning behaviors could be better helped/controlled. If you don't find there is any issue, he'd be free to continue at Hillside."

Following their evaluation of the student, two other doctors recommended a "gradual return to school supplemented with positive reinforcement, school scenario role playing, and efforts to build C.L.'s social and coping skills." The student's treating psychologist likewise recommended a gradual transition back to school. The court determined that C.L. has a long history of anxiety at school, and that the "although C.L. is not a reliable reporter of objective facts, the record nevertheless demonstrates that C.L. *perceived* he was abused in Ms. Badger's classroom and on the bus... According to his parents, C.L.'s perceptions rendered him too anxious to return to Hillside, a reaction entirely consistent with C.L.'s long history of anxiety towards new environments."

The problem came down to months of no instruction, and the school's "stubborn insistence the C.L. could simply return to Hillside at any time[.]" The school's position "inappropriately shifted the burden of complying with the IDEA to C.L.'s parents. BSD embraced this position without seriously considering alternatives that might have addressed the Parent's legitimate concern that their son would be harmed by returning to a school environment that he—rightly or wrongly—feared." The court found in favor of the parents and ordered briefing on appropriate relief, including compensatory services.

*A little commentary:* The problem here is that even if the student isn't at home due to illness or accident, he's at home and getting no services and the medical data speaks of transition not immediate return. There was no data, said the court, indicating that immediate return to school was possible. Once the student is at home, and transition is necessary to bring him back, the school must provide transition service to effectuate the move, and the duty to provide FAPE has to be addressed. Some homebound instruction seems to be the place to start. Would the court's position have been different if the school has arranged for the teacher, Ms. Badger, to work with the student and home, allowing the school to gather information about his reaction to her and readiness to return? What if the school had provided counseling or school psychological services that addressed the student's anxiety and ability to return to school? Had those services occurred early, they might have bolstered the school's position that homebound was inappropriate, and that the student was able to return to immediately to school. See the discussion below on services, in addition to instruction, that might be necessary to return the student to a less-restrictive environment.

## **II. Determining appropriate services for students served by the public school at home**

### **A. The school has a process for that.**

State law and local policy likely create criteria to consider and a path for the IEP team or Section 504 committee to follow to determine whether a student requires home instruction. Likely required are a medical opinion that the student is confined to home; IEP team, Section 504 committee, or other group discussion; and a process for determining whether homebound is appropriate, and if so what to do about it. But process can be challenged, especially if the application of the process to a particular student is discriminatory. A few examples:

**No Periodic Updates of Student's Medical Condition = Change in Placement?** *Abington Sch. Dist.*, 112 LRP 41953 (SEA PA 08/06/12).

"The District claims that it was entirely reasonable for it to request periodic medical documentation so the IEP team could properly consider maintaining Student's very restrictive instruction in the home placement. There can be no question, and Parents do not even dispute, that the District can and should be periodically provided with current information about Student's medical condition. The requests made by the District to obtain such information were, therefore, reasonable. The District's apparent attempt to enforce those requests by threatening an immediate change in Student's special education placement by means of a message to Parents from a School District official without convening Student's IEP team and without issuing a NOREP [prior written notice] is, however, a clear violation of IDEA procedures." [Bracketed material added.]

*A little commentary:* The school apparently attempted to apply a rule for regular education homebound instruction to this special education student, without benefit of the procedural protections that flow to the child due to eligibility. The hearing officer found a violation, and discussed the obvious health risk as well. "Furthermore, none of the policies relevant to this case would support a decision to expose a medically fragile student to the risks inherent in a school environment based on technical noncompliance with a documentation request, particularly a student whose medical condition has been well known to the school district, as in this case." Of course, if there is no current

data from the doctor, and the student is out in the community during the school day (that is, there is evidence he is not confined to his home), the IEP team ought to be able to consider that data and its impact on placement in an IEP team meeting. The problem here was the absence of the special education process and IEP team consideration.

**If you don't pass your homebound classes, homebound is terminated?** *Charlotte-Mecklenburg (NC) Schools*, 114 LRP 36318 (OCR 2014). Two siblings were placed on homebound due to generalized anxiety disorder and other medical conditions documented by the doctor. Five weeks later, updated medical information was provided calling for continued homebound for both. The “teams went against the doctor’s recommendations and terminated homebound instruction for both students.” Classroom teachers were concerned that both students were generally making good grades prior to homebound, but on homebound, “the students were not completing their homebound assignments in most classes and generally had failing grades. Teachers expressed concern that the students would not be able to complete their work by the end of the school year.” OCR found a violation, since bringing the students back to the campus from homebound was a significant change of placement, it required a re-evaluation. “The team chose not to follow the recommendations of the students’ doctor when it terminated homebound instruction, but it did not conduct its own assessment of the students’ medical conditions. It did not attempt to contact the students’ doctor to obtain more information and it did not attempt to have its own personnel evaluate the students.” But what about the grades?

“The team also based its decision on the students' poor academic performance in the homebound placement. The team stated that the students would perform better and have a better chance of completing their work by the end of the year if they returned to school. However, **a student who is physically or psychologically unable to attend school must remain in a homebound placement regardless of his or her academic performance in that placement.** If a student is performing poorly in a homebound placement but is unable to return to school, it would be appropriate for the team to consider whether the amount or type of homebound services provided to the student should be changed in order to ensure that the student is receiving FAPE in the homebound placement. The team failed to do so here. **It did not consider whether the students' poor performance resulted from the Division's failure to provide FAPE...** It also failed to consider changing the amount of homebound instruction, providing related services such as counseling, or providing additional accommodations, such as recording classes or Skyping classes as the Complainant suggested multiple times, to address the students' poor academic performance. **During Student 1's meeting the Coordinator went so far as to suggest that Student 1 give up on the school year altogether to focus on his health, which obviously would not provide FAPE.**” (Emphasis added).

**15-day waiting period even for multiple anticipated blocks of absences?** *Traverse City (MI) Pub. Schs.*, 59 IDELR 144 (OCR 2012). Despite the fact that the student is multiply disabled and has frequent, recurring absences, the school refused to provide a “just-in-case plan” for homebound services during ragweed season, instead relying on policy which created a 15-day delay between verification by a physician and start of services. “OCR concludes that the District’s failure to modify its practices and procedures to provide for educational services for foreseeable absences related to recurring or episodic conditions related to students’ disabilities, without requiring an IEP meeting in every instance or waiting fifteen days to provide home instruction, violates the Section 504 regulation [on Free Appropriate Public Education] at 34 C.F.R. §104.33[.]” (Bracketed material added). Note that if episodic plans are appropriate for IDEA-eligible students (where the procedural protections are higher) the concept should apply with equal if not more force to Section 504 students, especially in light of the Congress’ treatment of episodic impairments under the ADAAA.

For an example of an IEP providing a version of “as needed homebound,” see *Eric H. v. Methacton Sch. Dist.*, 38 IDELR 182 (E.D. Pa. 2003)(Student with a fragile immune system due to complications from leukemia was offered an IEP that provided for homebound instruction for one

hour per day after he had missed three days of school in a row. Were he to miss 20 school days in a row, the IEP team would meet to determine whether additional services were necessary.).

## **B. How many hours of home instruction are required?**

**Are full-day services required in home instruction?** *Renton Sch. Dist.*, 111 LRP 72136 (SEA WA 11/10/11). In response to parents' objections to the adequacy of home instruction (the district offered 90 minutes per day), the hearing officer provides the following review of authority and notes no authority requiring full-day home instruction.

"There is no requirement that homebound instruction be for the full school day, nor that it provide the same number of special education minutes the student received while attending school.... See *Georgetown Independent School Dist.*, 45 IDELR 116 (SEA TX 2005)(6 hours per week, increased to 15 hours per week, provided FAPE to high school student on homebound instruction due to aplastic anemia); *Montrose County School Dist.*, 37 IDELR 207 (SEA CO 2002)(district provided 4.5 to 6 hours per week of homebound instruction in a library to 12-year-old with emotional disabilities, and student made some academic progress; FAPE was denied not due to number of hours, but because instructor had never seen the student's IEP and did not address its goals); *Greenville Independent School Dist.*, 102 LRP 12471 (SEA TX 2002)(homebound instruction given to high school student with multiple physical and emotional disabilities was appropriate; 'Clearly, homebound instruction is a reduced version of weekly classroom instruction. Where the typical ninth grader at Greenville High School might spend thirty or more hours per week in classroom instruction, Zachariah would have eight hours per week of instruction.');

*Independent School Dist of Boise*, 35 IDELR 147 (SEA ID 2001)(district provided two hours per week of home bound instruction at a library to 7th grade student with emotional disabilities, with goal of transitioning her back to school in 6 to 12 months; FAPE was provided); *East Stroudsburg School Dist.*, 30 IDELR 211 (SEA PA 1999)(two hours per day of compensatory instruction awarded for each day a 7th grade student received no homebound instruction when he was psychiatrically unable to attend school)."

**Who supervises the child?** The parents in *Renton* argued unsuccessfully that the school either had to provide full-day homebound services for the child, or, in the alternative, supervise him for those parts of the school day during which no instruction was provided. *Renton Sch. Dist.*, 111 LRP 72136 (SEA WA 11/10/11).

"If a special education student cannot attend school due to a physical illness or disability, the school must provide FAPE via homebound services. **If FAPE is provided in less than a full school day, the district is not liable for care of the child for the remainder of the day.** The same is true when the student's inability to attend school is due to an emotional disability. It is unfortunate that the financial burdens associated with a disabled child often fall on the family, which may not be equipped to meet them. The IDEA does not provide the family relief in this situation." (Emphasis added.)

**Can the school just provide the state-required minimum?** Many, if not all states, have established some sort of floor for the minimum number of hours a student can receive home instruction (this floor may be tied to funding for the placement). The state minimum is not a "safe harbor" as the level of services to be provided a student under the IDEA should be individualized and determined by the IEP team. See, for example, *Torrance Unified Sch. Dist.*, 111 LRP 19380 (SEA CA 03/04/11)("For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment.... Given the severity of Student's needs, five hours per week of home instruction was simply not a FAPE."); *In re Student with a Disability*, 111 LRP 5952 (SEA CT 10/29/10)("The haphazard homebound instruction offered by the Board, contracted out and lacking appropriate supervision and documentation, failed to address Student's needs." As compensatory services, the Hearing Officer ordered "an appropriate long-term homebound program must include all the classes

and services for which Student is eligible, and may not be limited by the ten hours a week regulatory minimum.”).

**Can the school set a maximum number of home instruction hours that it will provide?** No. *Yancey (NC) County Schs.*, 51 IDELR 23 (OCR 2008). District homebound procedures included a restriction that because homebound consists of one-on-one instruction, the maximum number of homebound instruction hours is five hours each week. Without direct discussion of the five-hour cap, OCR indicates that the complaint was resolved by the school’s agreement to review (via the Section 504 committee) the student’s homebound services and make an individualized determination of whether he had the capacity to benefit from homebound instruction and if so, how much would be required. The committee is then instructed to make up the difference, if any, between what is required and what was provided. The school also agreed to revise its policy on homebound “to delete a reference that the maximum number of hours of homebound” instruction is five hours each week. *See also, Polk County School District*, 114 LRP 47035 (SEA FL. 2014)(“any policy or regulation that arranges a set time of homebound instruction without substantive considerations of the student’s individual educational needs would constitute a violation of IDEA under 34 CFR 300.39(a)(1) and 34 CFR 300.39(3).”).

*A little commentary:* While the school’s likely concern over the difficulty of providing one-on-one instruction in the home is understandable, and a service cap would make the problem more manageable, the limit is contrary to the requirement that the determination of services (including the amount/frequency of services) must be individualized.

**Does the student’s condition have any bearing on the amount of home instruction services (or the time of day services are provided)?** Of course. *Abington Heights Sch. Dist.*, 112 LRP 16163 (SEA PA 03/13/12).

“The number of hours of instruction provided to Student was based on the District’s formula for educating both regular education and special education students in the home setting when necessary. **No consideration was given to determining whether 10 hours of weekly instruction, delivered in two hour blocks in the late afternoon, is reasonably calculated to assure meaningful progress for Student, given the significant physical conditions that adversely affect Student’s strength and ability to attend to instruction.** The District also gave no thought to assuring that Student had access to the content areas of the general education curriculum, such as science and social studies, despite the opinion of the teacher who provided Student’s instruction for three years that Student would benefit from such instruction if provided earlier in the day. The District apparently believes that the difficulty of providing instruction other than after regular school hours relieves it of the obligation to provide instruction in all areas of the curriculum.”

*A little commentary:* In situations where the student, because of the very condition that confines him to the home cannot participate in instruction (or can do so in only a limited manner), the IEP team should consider alternatives such as extended school year or additional hours when the condition improves. *See also, In re Student with Disability*, 111 LRP 59292 (SEA CT 04/20/11)(“While it is agreed that the Student can currently manage two hours of instruction on a good day with homework on her own, if her condition improves she would benefit from an increased amount of tutoring in preparation for a return to school.”).

**The instruction must be individualized to meet student need.** *Montgomery County Public Schools*, 114 LRP 39538 (SEA MD. 2014)(After the homebound teacher for a student with autism reported that the instructional materials provided were too advanced for the student and were causing him to be frustrated, there was no effort by the school or the IEP Team to address the issue and ensure the appropriateness of the materials. The school was found in violation of IDEA).

**Documenting the commitment of home instruction resources to the student.** *DeKalb County Cent. United Sch. Dist.*, 111 LRP 51791 (SEA IN 12/03/10). The student’s IEP indicated that she would

receive “up to 13 hours of direct instruction on a weekly basis from a TIA” (teacher instructional aide). That approach is problematic as the IEP is then unclear as to the school’s commitment of resources to the child. “Although stating the amount of services as a ‘range’ is permissible when necessary to meet the unique needs of the Student, when a ‘range’ is used, the IEP must also specify the criteria determining the amount of services that will actually be provided.” Unfortunately, the school did not provide any criteria. “[T]he IEP does not provide any justification or criteria for determining the amount of direct instruction to be provided in any given week. When Schools provide the amount of services in a range, the Schools are held to providing the maximum amount of hours per week.” Compensatory services were ordered to reach the IEP’s 13-hours-per-week commitment. The use of the aide to provide direct instruction was also a problem, addressed elsewhere in these materials.

**Does the school have to make up home instruction sessions missed by the student?** While compensatory education requirements will apply to the school that fails to provide services resulting in a denial of FAPE, where the services were available and the student was not present to be served, there is no duty to makeup the services. *Greenville Indep. Sch. Dist.*, 102 LRP 12471 (SEA TX 02/01/02). Note that where the missed sessions are due to the disability itself, and are substantial because of the number and timing of treatments, for example, the safe position for the district would be to reschedule.

**What happens when the student doesn’t show up for home instruction? Is it truancy?** Just because a student is no longer in attendance at the campus does not necessarily remove his state-law compulsory attendance duty to attend. Consequently, students on home instruction who frequently miss services (the student is not at home, refuses to come out to be taught, etc.) are conceivably still subject to truancy actions. *Why* the student is not participating will be a critical component in the success or failure of compulsory attendance actions. Since the student is already recognized as restricted to home due to an impairment, and in most states a doctor has so opined, a truancy judge will want to see evidence that the lack of participation is not due to the obvious medical condition. In these situations, evidence of the student’s pursuits outside the home, summarized earlier in *Calallen*, *Plano*, and *Bellingham* (in the discussion on student confinement to the home) will be necessary to support a truancy claim. Of course, where the home instruction teacher is prevented by either student or parent from providing the required instruction, an IEP team meeting should be called to discuss the issue and address the barrier to instruction.

**Does the school have to make up home instruction sessions missed by the teacher?** *DeKalb County Cent. United Sch. Dist.*, 111 LRP 51791 (SEA IN 12/03/10). That requires a bit of analysis. In *DeKalb*, the problem is complicated by the student’s physical condition. The student is confined to home due to concerns over exposure to communicable diseases. “Two doctors have advised the School that any persons who come in contact with the Student must be noninfectious and wear a mask and gloves while interacting with the Student.” Further, when the service provider is ill, the provider must avoid contact with the student during the illness and for a period of three days following the illness, at a minimum. Here, the teacher instructional aide (TIA) is critical to FAPE. “If the TIA is sick and cannot meet with the Student, not only does the Student miss hours of assistance from the TIA but the Student is also unable to participate fully in the classroom instruction provided via audio/video feed. The School does not have a consistent substitute available on days that the TIA is not able to work with the Student.” No direct instruction was provided during the first eight days of the school year, and six days were lost due to TIA absences with neither substitute nor makeup day provided.

**“Limited and intermittent illness of staff and the resulting loss of services to students is expected and is generally not considered to be an interruption of services.** However, because the absence of the TIA also precludes the Student’s access to any educational services on those days and because such absence is extended for three additional days even when the TIA is well enough to return to work, compensatory services are warranted.” (Emphasis added.)

*A little commentary:* The school had tried to characterize the days missed by the TIA as student absences, which days were not subject to rescheduling or compensatory days “because the School

considers the absence to be a unilateral removal or declination of services.” The hearing officer disagreed with that characterization. “On days when the TIA is not available to provide services the Complainant has not unilaterally removed the Student from services nor has she declined services for those days. The Student should not be counted absent on the days when the TIA is unavailable to provide services.”

**When should home instruction start?** *East Stroudsburg Sch. Dist.*, 30 IDELR 211 (SEA PA 1999). A seventh-grade student eligible as OHI was served “largely or entirely in regular education.” The school requested an expedited due process hearing to remove him to an interim placement following his threatening of staff and verbal and physical aggression toward peers including fighting, scratching, name-calling, profanity, and death threats. While that request was pending, the student was absent on doctor’s orders, and the parents requested homebound instruction. Homebound was not provided in a timely manner, giving rise to this claim for compensatory education. The review panel provided the following analysis describing the interplay of Pennsylvania’s rules on home instruction and the IDEA’s FAPE requirement.

“The interaction of the home instruction and special education laws may be analyzed as a sequence of steps in cases like this one. First, if a student with a disability is absent under the temporary excusal provision of Pennsylvania law for a de minimis period, compensatory education is not a consideration. Second, once such a student has been absent for more than a de minimis period, the District is obligated to continue to provide the child with FAPE. Third, if the District fails to fulfill this IDEA obligation, then the remedy of compensatory education applies, depending on equitable considerations.”

The parents requested homebound via a written application on October 14 but homebound instruction did not begin until December 7 that same year “due to the difficulty in finding a willing instructor.” The hearing officer opined that compensatory education should have begun on October 26, one week after the school accepted the parent’s written application, which would have allowed for “five working days as a reasonable amount of time to secure a homebound instructor.”

*A little commentary:* At what point the absences exceed de minimis status is a matter to discuss with your school attorney who can address that line in the context of state law and hearing officer decisions. Schools can also look to IDEA rules on educational services during disciplinary removals as a possible analogy (though certainly not binding authority in the absence of a disciplinary removal). By analogy, disciplinary rules indicate that after 10 days without instruction, the problem is no longer in the neighborhood of de minimis. As a practical matter, schools must understand that the sooner services can be provided, the better, as the student will one day return to the school and will be faced with the task of catching up and the school will be faced with accountability by way of a statewide assessment.

### **C. What services are required at home?**

As a general rule, if it’s on the IEP prior to the student going into home instruction, it should be the subject of IEP team discussion when the student is confined to the home. *See for example, Cincinnati City Sch. Dist.*, 111 LRP 67197 (SEA OH 08/30/11) (“The student was receiving occupational therapy and physical therapy during the previous IEP, however, once the student was placed on home instruction those services were removed due to home instruction. If the IEP team believes that the student requires occupational therapy and physical therapy, the IEP team must include these services regardless of the student’s placement on home instruction.”). Further, where there are barriers that prevent the student’s receiving benefit from home instruction, the barriers should be addressed as well. *See, for example, Torrance Unified, supra*, (absence of mental health services contributed to inappropriateness of home instruction services).

**Does home instruction have to be provided in all of the student’s classes or just core curriculum subjects?** A Connecticut hearing officer answered the question by reference to 34 C.F.R. 300.10

defining core academic subjects (by reference to the ESEA). Commentary to this provision ties it to the duty with respect to annual IEP goals. “As required in § 300.320(a), each child’s IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum, and a statement of the special education and related services and supplementary aids and services to enable the child to be involved and make progress in the general education curriculum.” Said the Connecticut hearing officer, “Section 34 C.F.R. 300.10 lists core academic subjects: English, reading or language arts, mathematics, science, foreign languages, civics and government, economics..., history and geography. It appears that the Board has no legal basis for refusing to provide Spanish instruction within a homebound program.” *In re Student with Disability*, 111 LRP 59292 (SEA CT 04/20/11).

**Homebound as a reduced version of the week’s instruction.** *Greenville Indep. Sch. Dist.*, 102 LRP 12471 (SEA TX 02/01/02). “Clearly, homebound instruction is a reduced version of weekly classroom instruction. Where the typical ninth grader at Greenville High School might spend thirty or more hours per week in classroom instruction, Zachariah would have eight hours per week of instruction. Accordingly, the homebound teachers had to focus on the main points of the lessons while implementing the required modifications and allowing for the plethora of missed sessions. Zachariah’s complaints about his homebound services are without merit.”

**What if the student was in advanced classes for gifted students prior to homebound?** *K.K. v. Pittsburgh Public Schools*, 64 IDELR 62 (3<sup>rd</sup> Cir. 2014). During her junior year in high school, the student was diagnosed with gastroparesis that required hospitalizations and prevented her from attending class. She had a recurrence her senior year. The school determined that she was Section 504-eligible and created a plan that provided for homebound services. An IDEA evaluation was offered by the school and refused. The parents were unhappy with the level of instruction by the homebound teacher, arguing that it was far less than what she was accustomed to receiving in the school’s Center for Advanced Studies (CAS) which “offered rigorous coursework in advanced subjects for gifted students.” Her CAS course load included English, Japanese, Chinese, calculus, physics, European History, and biology. As the homebound teacher could not personally provide “direct substantive guidance” in all of those classes, the student dropped two, and attempted to self-teach others with the help of a private tutor. Shortly thereafter, the school amended her 504 Plan to include a guarantee of at least one class period per week of direct instruction from a qualified instructor in English, Calculus, Japanese, Chinese, and Physics, and very generous accommodations. She returned to school after approximately three months of homebound services, and graduated 21<sup>st</sup> out of 336.

The parents sought compensatory services due to an alleged lack of FAPE during homebound. The court rejected the claim as there was not intentional discrimination (a required element in the Third Circuit) and because the 504 plan had been revised to “offer increasingly significant modifications to the school’s advanced course requirements to fit (student’s) needs as a gifted student.” The homebound policy was not intended to duplicate the classroom, especially a gifted classroom. Wrote the court

“the District’s homebound instruction policy was never intended to be a full substitute for in-class learning—but nor was it required to be. Instead, it is a stopgap procedure designed to give temporarily homebound students a reasonable opportunity to maintain pace with their coursework during a limited absence from the classroom setting. As implemented here, the policy resulted in District personnel working actively with K.K. and her parents to provide a modest approximation of the high-caliber instruction that K.K. had received while actively attending class.”

**Some assignments don’t work in a homebound setting.** *Greenville County (SC) Schools*, 114 LRP 47376 (OCR 2014). The student receiving homebound services is not required to fulfill the same assignments or complete the same projects as her school-attending peers. For example, where “some assignments required group work or laboratory experiments and were not appropriate for a student receiving homebound services.... The teachers met the student’s individual needs by providing him assignments that corresponded to the concepts and topics taught in class[.]”



**Can the presence of the parent or other adult be required for homebound services?** *Daniel O. v. Missouri State Bd. Of Educ.*, 30 IDELR 588 (W.D. Mo. 1999), *aff'd*, 32 IDELR 113 (8th Cir. 2000). While not required in the IDEA itself, many schools condition the provision of homebound services on the presence of a parent or other adult in the home when services are provided. The requirement clearly imposes a burden on parents to either be available themselves or find a willing adult to take their place. The condition does not violate the IDEA. Citing *Rowley* with respect to the FAPE requirement, the District Court explains:

“As this test makes clear, the ‘free’ criteria in ‘free appropriate public education’ is met if the instruction and support services provided Daniel are provided at public expense. Therefore, the IDEA’s requirement for a ‘free appropriate public education’ is implicated by the state’s requirement that a parent or other adult be in the home only if the presence of the parent or other adult is a support service (i.e., a ‘related service’). Daniel’s parents do not, however, assert either in the complaint or in response to defendants’ motion to dismiss, that they are performing a ‘related service’ by remaining in the home with Daniel. They have only asserted that because they have had to bear certain costs as a result of the policy, the state is prohibited from enforcing it. Additionally the documents attached to plaintiff’s complaint from the administrative proceedings indicate that this issue was not raised in the administrative proceedings below. I find that defendants’ requirement that a parent or other qualified adult be present in the home during the hours of Daniel’s homebound instruction is not prohibited by the IDEA and that plaintiff’s allegations in that respect do not state a claim under the IDEA.”

*See also, Renton Sch. Dist.*, 111 LRP 72136 (SEA WA 11/10/11)(“when no adult was present in the home for the first four days of the 2011-2012 school year, home instruction did not proceed. Under *Daniel O.*, the District is not liable for the lack of instruction on those days.”).

**Scheduling homebound services.** The issue is somewhat tied to the previous discussions on whether schools have to provide full days of homebound instruction or, in the alternative, supervise the child during non-instructional time in a normal school day when parents are at work and unable to supervise. It likewise is tied to the discussion on a school requirement that the parent or other adult be present when homebound services are provided. Clearly, the provision of FAPE in the homebound setting will impact the parents and family of the student served.

For example, in *Renton, supra*, the parents objected to the timing of the homebound services. “The parents stated that the timeframes of 9:00-10:30 a.m. or 4:00-5:30 p.m. did not work for the family schedule,” nor would 5:30-7:00 p.m. work due to the children’s extracurricular activity schedule. Citing an unpublished 3d Circuit case, the ALJ concluded in *Renton* that

“The parents’ scheduling needs likewise did not determine the propriety of homebound instruction in *Falzett v. Pocono Mountain School Dist.*, 152 F. App’x 117, 44 IDELR 121 (3d Cir. 2005, unpublished). In *Falzett*, the parents would not accommodate the district’s homebound teacher at times when the student’s private tutors were scheduled. The court held the parents could not claim a failure to implement homebound instruction for hours when their scheduling needs did not allow the instruction to proceed.”

*A little commentary:* Care should be taken to avoid “take it or leave it” offers of services unless the school has first engaged in some good-faith efforts to work out a solution with the parents. Should litigation strike, the school will want to argue the high ground, that its offer was appropriate. It may be difficult to take that position if it has not discussed the family’s scheduling needs or considered options jointly with the family. This is a situation where involvement of the school attorney could prove helpful.

#### D. Who can provide the services in the student's home?

**Direct instruction on homebound is provided by licensed teachers.** *DeKalb County Cent. United Sch. Dist.*, 111 LRP 51791 (SEA IN 12/03/10). A medically fragile student who was highly susceptible to communicable disease was served through homebound via a live audio/video feed with the third-grade classroom. A teacher instructional aide reinforces the classroom activities in the student's home. Per the IEP, the aide also provides direct academic instruction, including material not covered in class. The aide is not a licensed teacher. Unfortunately, the feed did not always function properly. The hearing officer determined that direct instruction must be provided by a licensed teacher and the use of the aide for direct instruction was a violation of law.

**Qualified instructors for homebound instruction may be difficult to find.** *See, for example, East Stroudsburg, supra*, where the school attorney reported that "the District had received 18 requests for homebound instruction during the current academic year, and that it was unable to find homebound instructors for 6 of them, including Stephen."

*A little commentary:* The difficulty of finding licensed teachers to provide homebound services does not remove the school's obligation to provide FAPE for students with disabilities confined to the home. In these situations, a technology solution (webcam, videoconferencing, recorded class instruction, robot avatar, online or cyberschool approach described below) can ensure that actual instruction is performed by a licensed teacher while not requiring the licensed teacher to actually visit the home. Of course, the effectiveness of these options will depend on the needs of each individual student. In the absence of these possibilities, the school should carefully consider with the school attorney offering compensatory education to be accomplished when the student can return to school or an appropriate teacher identified.

**Parent preference and home instruction service providers.** *Los Angeles Unified Sch. Dist.*, 54 IDELR 269 (SEA CA 2010). The parent was concerned about the school using "a revolving door" approach to personnel providing homebound services, arguing that the student has "a difficult time adjusting to change, and requires structure, consistency and routine" negatively impacting his educational performance. The parent demanded that the school provide her student homebound services from a particular teacher. The facts did not support the concern, as the student took only a couple of weeks to adjust to a new teacher. Further, the district established that the new teacher was qualified and could meet the student's needs. Citing well-established law, the ALJ addressed the parent's preference for a particular service provider in this way: **"Parents generally have no right to compel an assignment of particular teachers or other educational personnel to implement the IEP. These decisions are normally within the discretion of the school district."** (*Moreno Valley Unified School District*, 109 LRP 50610 (SEA CA 2009), citing *Letter to Hall*, 21 IDELR 58 (OSEP 1994), and *Rowley, supra*, 458 U.S. at pp. 207-208.)(emphasis added)."

**Staff safety in the home environment.** *Wake County (NC) Schs.*, 39 IDELR 273 (OCR 2003). The parent complained that her student had been denied homebound services pending the identification of a residential facility. The student is a 20-year-old with autism and obsessive compulsive disorder. "District records indicate that the Student has attended four different high schools and during this time was involved in at least nine incidents that resulted in him physically harming a staff person and/or student, breaking a staff person's nose; and slapping a visiting parent, etc."

"The IEP team also determined that the District could not provide homebound services to the Student pending residential placement because it could not ensure the safety of staff in his home. The number and seriousness of assaults over the past few years was the basis for the IEP team's decision to deny him homebound services and place the Student in a residential facility. Additionally, according to the District, the complainant had informed District staff that the Student recently had attacked her at home resulting in the police being called."

During the manifestation determination meeting, the IEP team also determined that it would provide compensatory education for education missed between his removal from school and placement in a residential facility (as no home instruction was offered). The district immediately began its search for an appropriate residential facility.

“Based on the evidence presented, it appears that the District’s concerns about safety of staff and students, as well as the Student were reasonable, particularly given the incidents listed by the District. The District has made reasonable efforts to find an appropriate residential placement and actively involved the complainant in this process. In addition, the District has agreed to provide compensatory services for the period of delay in finding an appropriate placement.”

No violation was found.

**What if the home is not conducive to education?** *Grasmick v. Matanuska Susitna Borough Sch. Dist.*, 64 IDELR 68 (DC AK. 2014). Various teachers and therapists attempting to provide required IEP services in the student’s home reported that the environment was not conducive to education due to the behavior of the student’s parent. The physical therapist reported “that she had been turned away from the home on multiple occasions, including one time where she was kept standing on the porch for 45 minutes.” When she did get inside the home, the work “environment at the Grasmicks’ home made her extremely anxious, gave her a ‘kind of fist feeling in my gut,’ and that she was not sure if she would be able to remain on AG’s IEP team ‘if the environment is not able to change.’ Her ability to provide services was frustrated by the parent who “seemed to want to absorb our attention with her needs, her agenda, her concerns, during our treatment time.” Other providers complained of the parent being “verbally abusive,” and that the environment was “highly charged.” Ultimately, the hearing officer concluded that “AG’s services should no longer be provided in the Grasmicks’ home due to the fact that the ‘District staff are essentially held hostage to [the Grasmicks’] overwhelming animosity toward the district.’” Wrote the court:

“The Hearing Officer took testimony from a number of witnesses, including the Grasmicks, and found that the Grasmicks’ conduct was ‘willful interference with the District’s efforts to provide services to [AG].’ The Hearing Officer points out that the Grasmicks genuinely believe they are engaging in nothing more than advocacy for their son, but the ‘testimony of the providers was credible and remarkably consistent’ in their description of the ‘tremendous difficulty and, at times, impossibility of [providing services to AG] given [the Grasmicks] conduct.”

The district court upheld an ALJ order that the parent cooperate with the provision of homebound services while the district looked into other possible locations to provide the services.

**Homebound in locations other than the home?** When the student cannot be safely instructed in the home or where the home environment cannot be made suitable for instruction, the home instruction can occur at other agreed locations. *See, for example, East Stroudsburg Sch. Dist.*, 30 IDELR 211 (SEA PA 1999)(District and parent discussed possibly using a neutral location for home instruction, like a public library); *Renton, supra* (As part of the student’s transition, the school may include among safety contingencies a return to library or home instruction if the student is unable to tolerate the community activities); and *Oneida (NY) City Sch. Dist.*, 54 IDELR 173 (OCR 2009)(School changes the location of homebound services to the school due to concerns from homebound teachers that “there were too many distractions present at the student’s home during the previous school year, and that the environment was not conducive to learning.” As noted previously, it’s easy to take for granted the benefits of the traditional school with respect to an environment conducive to learning with reduced distraction, space designed to engage the learner, etc. Some home situations may not be conducive to learning, due to size or layout, presence of younger siblings, other family members, neighborhood distractions, or other issues.

**Homebound placement because of behavior?** Yes, followed by residential placement. *Van Far R-1 Sch. Dist.*, 31 IDELR 251 (SEA MO 2000). A 10-year-old, 200-pound student with autism exhibited aggressive behaviors resulting in injury to aides and staff. The behaviors often occurred without an identifiable antecedent and interfered with his education and that of other students. A temporary homebound placement was agreed to in an attempt to stabilize the behavior, with the student returning to school once he accomplished 10 consecutive school days without aggression toward teacher or aide. Parents asked for a less-restrictive setting, while the school sought a residential placement. Said the hearing panel, “[E]ven the best efforts of the School District did not result in a long-term improvement of J.W.’s behavior which would allow J.W. to benefit from the instruction in the regular classroom environment, special education resource room environment, or homebound instruction in the elementary school environment.” Residential placement ordered at school district expense.

*A little commentary:* Under the IDEA, the eligible student gets FAPE somewhere. While the threat to staff safety can result in moves to more-restrictive settings, the school cannot simply stop IDEA services. *See, for example, Vincent v. Kenosha Unified Sch. Dist.*, 59 IDELR 242 (E.D. Wis. 2012)(“Though KUSD had wide discretion to place BV appropriately, the IDEA and FAPE require that she had to be placed somewhere.”).

## **E. Technology and the student receiving educational services at home**

For students who cannot physically attend school, the ability to participate in direct instruction and school activities from home can be enhanced through a variety of technologies. The fact that enhancement is possible, however, does not necessarily mean that technology is necessary for FAPE. Put simply, **“although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary. Moreover, the failure to provide assistive technology denies a student FAPE only if the student could not obtain a meaningful educational benefit without such technology.”** *High v. Exeter Twp. Sch. Dist.*, 54 IDELR 17 (E.D. Pa. 2010). Consider this language from a hearing officer’s decision. “By way of dicta, there is certainly an intersection here of the tides of LRE as a physical location with a technological decoupling of place due to the virtualization of teaching and learning through technology. Those tides, though, swirl around educational policy and practice, technological capabilities and advances. This decision, however, is grounded in a simple question: has the District provided FAPE in the LRE by utilizing (or at least considering) available technological modifications to allow the student to access direct instruction as it is delivered in the regular education setting?” *Southern York County Sch. Dist.*, 55 IDELR 242 (SEA PA 2010). *See also, Georgetown Indep. Sch. Dist.*, 45 IDELR 116 (SEA TX 2005)(“The use of a web camera or video phone, while desirable and enriching, is not required to provide a free appropriate public education where, as here, the evidence shows significant educational progress by the student without the assistance of those devices.”).

**1. Webcams & videoconferencing.** For the student who cannot attend school or participate with other students due to concerns over infection, for example, accessing the classroom from home can be an effective method to provide FAPE during a homebound confinement. At the heart of this technology are a camera and microphone in the classroom that capture instruction and classroom activity, an Internet or telephone link to the student’s home, and a receiver that allows the homebound student to view and hear, and be viewed and heard in the classroom.

Webcams and videoconferencing can provide access to many more hours of direct instruction than are typically possible in a traditional homebound instruction situation, and the homebound student sees the same instruction provided to students in the child’s classroom, creating easier transition back to school when the homebound confinement is no longer necessary. Further, the student may be able to interact with peers and maintain contact with friends in the school environment. A few cases address some of the issues arising from the use of this technology.

**Webcams & direct instruction during homebound.** *Southern York County Sch. Dist.*, 55 IDELR 242 (SEA PA 2010). The student qualifies under the IDEA as OHI due to mevalonic aciduria and a learning disability. Approximately once a month, the student experiences an acute inflammatory response akin to a very severe flu. During the acute phase (lasting 2-3 days), the student experiences very high fever, vomiting, deep bone pain, and significant loss of muscle mass. The student mainly sleeps during this phase. The recovery phase lasts from 3-7 days during which time the student is extremely debilitated and must restore lost muscle mass and regain strength through gastric feeding over the entire course of the day in order to return to school. During recovery, the student receives “intricate nursing services” but is able to read and attend to television. Upon completion of the recovery phase, the student can return to school and participate in instruction.

The problem arose from the student’s frustration and difficulty making up work following missed classroom instruction. The district’s offer was to provide the student with a webcam to view direct instruction during the recovery phase, but the student was required to come to school to use the webcam room. *While the parent has sought remote webcam access at home for years, the IEP team did not discuss and did not consider webcam access at the student’s home.* The webcam allowed the viewer to see the whiteboard at the front of the classroom and to pan to follow the teacher around the room. The teacher wears a microphone and iChat allows the viewer to instant message the teacher. An instructional aide would sometimes be present with the student in the webcam room. The student utilized the webcam room at school four times during the 2009-10 school year. “The student’s discomfort on one of these occasions led to the student lashing out verbally at the aide.” The student receives no direct instruction during homebound outside of the webcam room at school. He does receive homebound tutoring (one hour for every seven hours of absence), but the service is limited to assistance with completion of assignments and does not include direct instruction.

“The student’s absences lead to large amounts of incomplete work and overwhelming amounts of makeup work. This is due almost exclusively to the fact that the student misses extensive periods of direct instruction and tutoring cannot and does not provide it.” In short, the district’s on-campus webcam room approach is inappropriate. “[A]t any one time, the student falls markedly into one of three categories—non-episodic where the student requires no remote modifications, acutely episodic where the student is not instructional, or episodically recovering where the webcam room has proven ineffective; the District webcam room is inappropriate for any of these three categories.”

The LRE issue has a fascinating twist, since on its face, the district’s offer of a campus webcam room seems less restrictive. The trouble is the campus room is not appropriate.

“It seems counter-intuitive to find that a placement at a school-based site is more restrictive than a student’s home. Yet given the student’s diagnosis and symptoms, and the effect of those diagnosis/symptoms on the student’s learning, the District is in a position through the use of available technologies to make the student’s regular education environment available to the student as a live video/audio stream or on a storage device. While a live stream is available in the District’s webcam room, the potential harmful effect on the student or on the quality of services that the student needs outweighs the fact that it is physically located at a District site.”

Put simply, the school “has substituted five hours of assignment tutoring per week for hundreds of hours of direct instruction without any IEP Team consideration of available technological modifications that might allow the student to access direct instruction during the recovery phase.” The hearing officer ordered the IEP team to consider and discuss remote access to direct instruction at the student’s home during the recovery phase either by webcam or by storing audio/video files of classroom instruction on a portable storage device for delivery to the student on a regular basis during recovery.

*A little commentary:* One reason the school opposed home webcam access was that bandwidth in the community prevented proper videoconferencing between the school and the student’s home. The

school's IT witness opined that the reliability and integrity of Internet service in the area was sub-standard. While perhaps the case generally, the student's parent testified that due to demands for videoconferencing at home for work, his employer had upgraded his Internet connection at the family home, and that the connection "readily accommodates excellent streaming video." *See also, Dekalb County Cent. United Sch. Dist.*, 111 LRP 51791 (SEA IN 2010)("The School acknowledged that the live audio/video feed did not always work as it was intended," complicating FAPE since an instructional aide, not a licensed teacher, was sent to the home). On the access to instruction issue, the school could also have addressed the need by replacing a tutor with actual direct instruction (negating the need for webcam direct instruction and, perhaps, tutoring). For reasons not explained in the decision, that option was not pursued.

**Webcams & social interaction during homebound.** *Eric H. v. Methacton Sch. Dist.*, 38 IDELR 182 (E.D. Pa. 2003). The second-grade student qualifies as other health impaired due to acute lymphoblastic leukemia. Because of his compromised immune system, the student has received no vaccinations, and must miss school when the risk of infection to him is high. While it is difficult to predict how much school he will miss, his history shows significant absences. "He missed all of kindergarten, a significant amount of first grade, and forty-six days of second grade." The absences created socialization needs. Both the hearing officer and appeals panel found that his "needs are in the area of socialization, organization, appropriate classroom behavior, and interpersonal relationships." His social progress and maturity "lagged behind that of his peers." His IEP identified a variety of goals to address social and behavioral needs. The dispute centers on the parents' belief that video-teleconferencing (VTC) should be provided when the student is absent in order to work on socialization goals. The school would provide direct instruction at home and eliminate socialization goals in the homebound IEP that cannot be implemented during periods of homebound.

The district and parent conducted an experiment whereby the student was provided with VTC for absences of two hours or longer. The experiment was partially successful. The hearing officer found that he was able to participate in classroom activities and routines, interact with the teacher, enjoy recess, make friends, and maintain friends better than in the past. There were downsides as well.

"Some of his targeted social and behavioral conduct become worse when he is on VTC. He acts as if he is 'on stage,' gets off-task, breaks rules and engages in attention-seeking behaviors. This inappropriate demeanor interferes with Eric's peer relationships. *Moreover, his teacher's ability to correct him through non-verbal cueing and other methods, has had only short term benefit.* According to the testimony of Eric's teacher, who had first-hand knowledge of the effect of VTC on Eric and his classmates, VTC is disruptive to other students and the class... The use of VTC disrupts the classroom environment. Moreover, Eric's behavior while on VTC prevents him from making progress toward at least some of his social and behavioral goals.... The use of VTC does not reduce unwanted disruptive behavior or increase prosocial behavior. Eric continues to have difficulty using nonverbal cues, making eye contact, and being redirected in VTC situations. He continues to act inappropriately during VTC.... *Moreover, Eric's behavior worsens using VTC.*" (Emphasis added.)

Finding the disruption to the classroom and to his own educational benefit outweighed the advantages of the VTC, the court determined it was not necessary for FAPE.

*A little commentary:* The case provides insight into the difficulty of managing behavior via technology vs. a teacher's proximity to the student in a classroom. As noted previously, when the student is instructed at home (as opposed to the traditional classroom setting), some techniques will simply not work as well. Consequently, while VTC might be appropriate for other students, such was not the case for Eric. It would have been interesting had the VTC been part of the student's IEP and had the school attempted changes to the behavior plan to address the "on stage" complications (neither the behavior plan nor the IEP as a whole addressed VTC). Would proper behavior management, fine-tuned to the technology, have addressed the behavior satisfactorily? Apparently,

the question was not asked, as the court seemed to be content with social goals being addressed when the student was not receiving his services through homebound as analyzed below.

**What about the social goals that could not be implemented in the homebound setting?** Note that while the goals were not on the IEP during homebound, the goals were not forgotten. The student can work on social goals when he is in the classroom. Wrote the *Methacton* court:

“The District has acknowledged that some of the social objectives set forth in Eric’s IEP cannot be implemented at all during the periods that he receives homebound instruction. This does not mean, however, that these or any of his goals will be overlooked and go unfulfilled. Although the parties cannot predict the number of days that Eric might miss in any given school year, the administrative record reflects that Eric attended school on seventy-five percent of the school days during second grade. Because most of his social needs implicate his behavior in the classroom and his interaction with his peers and teacher, we believe that he and the District have a significant opportunity to address these needs on the days when he is physically present in classroom.”

*A little commentary:* This type of approach recognizes the limitations on the homebound setting. Not every goal and objective will be possible, and not every piece of curriculum will be part of homebound instruction. It is an impossibility to reproduce a school day experience in a few hours of instruction and such a result is not required.

**2. Cyberschools and online education.** Online education or cyberschools utilizing outside personnel who provide instruction over the Internet or by other electronic means can also be a source of instruction for the homebound student. This option may make sense for a school with no available teachers to provide home instruction, a staff stretched by existing homebound caseloads, or to address situations where the student’s classes are so complex or specialized as to outpace the expertise of existing school staff assigned to home instruction. Public schools’ provision of instruction in a learning environment where students are not in attendance in a classroom setting, and the teacher provides course content by means of course management applications, multimedia resources, Internet, videoconferencing, other alternatives, or combinations thereof, is a rapidly growing phenomenon. *See, for example, Muller, Virtual K-12 Public School Programs and Students with Disabilities: Issues and Recommendations* (NASDSE Policy Forum Proceedings Document, July 2010). NASDSE reports a 60 percent increase in K-12 online enrollment from 2002 to 2007, with current estimates of online enrollment of up to 1 million across the U.S. *Id.* at 1. As is the case whenever education is taken out of the school setting, these new arrangements can create interesting disability law implications, as student motivation, parent involvement, and technology needs complicate the delivery of services.

**Students with motivational, social, or behavioral issues.** While online methods can be highly effective, they can prove problematic for more dependent learners, or those with existing motivational or behavioral issues. *See, for example, Weaknesses of Online Learning*, Illinois Online Network, University of Illinois. The asynchronous nature of virtual programs give students greater flexibility and control over their learning experience, but also place greater responsibility on the student. Thus, some sources argue that virtual programs may not be appropriate for younger students or other students who are dependent learners and have difficulties assuming the responsibilities of virtual programs. *Id.*

Information on the student’s level of self-motivation, ability to manage time, and skills in working independently play significantly in the decision of whether a virtual program is appropriate for the student. Or, the 504 committee or IEP team may have to include safeguards in the program to ensure that the student is on task and submitting his own work. This issue is likely to generate discussion and possible disputes, as parents of students who exhibit school refusal, attendance problems, or motivational issues at school may decide to have the student attempt online educational programs in lieu of traditional attendance or home instruction via a teacher in the

student's home. The problem is that this type of student may be one for whom an online program demands more self-responsibility and initiative than the student may demonstrate. *See for example, Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013) ("Homebound placement is not the best educational placement for Student. Student does not perform well in academic settings where student is asked to work independently."). After a period of attempted online instruction without success, it may prove difficult to re-transition these students to a regular campus setting.

A related issue is the student with social skills deficits who seeks virtual instruction as the sole method for his education. The IEP team/Section 504 committee must determine how social skills deficits will be addressed as part of the program, and whether it is even possible to meet this area of need in a virtual program. For some high-functioning students with autism spectrum disorder, for example, development of appropriate social skills can be a key aspect of their educational program and IEP. Although these students may be well adept at managing the technological aspects of the programs, and will avoid potential social conflicts and problems that present themselves at campuses, IEP teams/504 committees might decide that such a program is detrimental to acquiring improved social skills.

**Disputes over the parent's expanded role in providing FAPE.** What happens when school staff who normally provide instruction simultaneously with student supervision and behavior management are not in the same place as the student? A couple of cases address the issue, focusing on an expanded role for parents when online education is pursued.

*Benson Unified Sch. Dist.*, 56 IDELR 244 (SEA AZ 2011). An Arizona parent alleged that the online program provided by the district for her daughter with multiple chemical sensitivities failed to provide her FAPE. The student qualifies under the IDEA as having an "other health impairment" (OHI). For a time, the student received homebound instruction by a teacher who followed a variety of protocols to prevent the student from being exposed to chemicals. At an annual IEP meeting, the team discussed the possibility of instruction through an associated online academy, and it believed that the program could meet the student's needs. The parent disagreed, arguing that the online program did not provide sufficient one-to-one instruction and that neither parent was available to serve as "learning coach." In response, the team added six hours of paraprofessional support in the home. The treating psychologist testified that he believed the online program was not appropriate because the student could not "self-motivate." The homebound teacher felt that the student was responsible and that requiring the student to do more work independently with the help of an online program would be beneficial. The hearing officer held that the online program, as individualized by the district, was appropriate for the student. The program could provide instruction with no printed materials whatsoever, and made available a certified teacher either online or in person. The paraprofessional, moreover, could fulfill the role of the "learning coach."

*Virtual Cmty. Sch. of Ohio*, 43 IDELR 239 (SEA OH 2005). Parents of a severely disabled, low-functioning child with Down syndrome and associated impairments alleged that the virtual school district's program failed to provide an appropriate IEP or confer FAPE. The hearing officer noted a significant difference between the brick-and-mortar school and the online or virtual school. "FAPE delivered in a virtual school has a different method of operation and a different mechanism for the evaluation of its students.... **When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher.**" (Emphasis added.)

*A little commentary:* The case illustrates the increased responsibility and role for parents in many virtual programs, as they help pace and sequence the program, monitor progress, assist with keeping the student on task, and spot problem areas. Normally, parents play little or no role in the implementation of their child's IEP or 504 plan in a physical campus setting, and have no legal responsibility to do so. If problems arise in a virtual program regarding parental duties, the IEP team or 504 committee must meet to discuss the problems and brainstorm how the problems can be



addressed. Note that in the *Benson* case (reviewed above), the school had to add paraprofessional assistance to ensure the appropriateness of the placement when the parent indicated she could not meet the role of the “learning coach.”

**Technology problems and the key role of technicians.** In the case of *Virtual Community School of Ohio*, reviewed above, the parent complained that there were periodic problems with both the software and hardware components of the online program. The hearing officer noted that these are “problems inherent in technology,” including viruses, down times, malfunctions, and other glitches. But, he found that the school addressed the problems promptly, and thus, there was no violation of the IDEA. Translated into the virtual realm, a legal argument that technology problems were not attended to in a timely or appropriate fashion can form the basis for a failure-to-implement claim if the facts show that the school was remiss in addressing the technological problems in a proper and timely fashion. Thus, the response time of technicians and technical teams will have legal implications in online programs. Schools must iron out possible technical problems, and have sufficient technician resources to address day-to-day problems and malfunctions. In addition, notices must be provided to parents that misuse or non-educational use of the program software and hardware can exacerbate the potential for technical problems. Staff must document any parental noncompliance with technology-use policies in case disputes later arise.

**Managing the instructional “shift” in the way material is organized and delivered, and students are supervised.** An instructional challenge for teachers who deliver online instruction is shifting the manner in which material is organized and presented. This is likely as much a matter of practice and familiarity as it is of training. Campus administrators will undergo a parallel shift as they adjust their supervision and monitoring of instruction to a virtual context. Similarly, the skills required to redirect a student to task or to address other behaviors that interfere with instruction must be fine-tuned to account for the lack of teacher proximity to student.

**Need for certain degree of student computer literacy.** Both students and staff will have to reach a minimum level of computer and operating system literacy to function within an online program. Some entry-level training may be necessary for some students to reach the required technical proficiency, while for others, the technical prerequisites to functioning in an online program may be too significant to overcome. Thus, a component of determining whether an online program is an appropriate placement for a special education student must be based on an assessment of the student's computer and operating system savvy.

**3. Robot avatars.** The availability of robot avatars that transmit audio and video, and move about the school on behalf of (and under the control of) the homebound student, creates both a challenge and an opportunity for IEP teams making FAPE decisions. *See, for example, Trend Alert: Prepare for robot technology requests for homebound students*, LRP's SPECIAL ED CONNECTION®, March 19, 2013 (discussing use of the VGo robot avatar in West Seneca (N.Y.) Central Schools for a student on homebound with a life-threatening allergy to milk and peanuts); Robbie Brown, *A Swiveling Proxy That Will Even Wear a Tutu*, THE NEW YORK TIMES, online edition, June 7, 2013 (“The VGo is four feet tall, weighs 18 pounds and is shaped like a white chess pawn, with a video screen on its face. Lexie controls its movement with her computer mouse. Video of the classroom at Alice Drive Elementary School appears on her computer screen, and video of her face appears on the robot's display screen. The robot and Lexie's computer support two-way voice communication, and Lexie can flash her VGo's lights to get the teacher's attention.”).

The robot avatar presents a mix of interesting capabilities. Like the webcam or videoconferencing, it can transmit to the homebound student in real time the goings-on of the student's classroom. Further, unlike some traditional systems, the camera and microphone are not anchored in place, but can move around the classroom and go with the class to the library, lunch, or other settings. Students and teachers interact with the avatar as they would with the student, creating virtual attendance and socialization opportunities not available when the technology is only present in the classroom. The

ability of the student to move the avatar about the building likewise empowers the student to be inquisitive and focus on things or people of interest. The homebound student gains a physical presence at school.

*A little commentary:* While no published cases on robot avatars were available when these materials went to press, use of the technology is subject to the same rules and FAPE concerns discussed above. Need drives the IDEA decision-making process. Where student needs are met, does the availability of a new method to address those needs require a change in the IEP? As with the examples of technology discussed for students on homebound, robot avatars are not universally required for FAPE. Here are a few things to think about when determining appropriateness of avatar use for a particular student.

**1) Projected length of homebound.** The length of projected homebound is important, as training of staff, the student, and classmates will be required for effective implementation of the avatar (*see, for example, Train staff, students how to use, treat robot*, LRP’s SPECIAL ED CONNECTION®, March 19, 2013) and because significant expense is involved (for the VGo, THE NEW YORK TIMES reports a cost of \$6,000, plus \$1,200 per year in maintenance and other costs). Robot avatars also require a reliable Wi-Fi signal that may demand significant technology infrastructure upgrades on campuses to ensure Wi-Fi in hallways, common areas, and any other place where the robot avatar might need to travel. Finally, where the confinement to home is expected to be of a relatively short duration, the need for a physical presence at school and the socialization benefits of the avatar would seem to be less important in the FAPE analysis, as social goals can always be addressed upon the student’s return to school, *Methacton, supra*, or through less expensive iChat, Facetime, Skype, or other technologies using existing tablets and classroom computers.

**2) The student’s ability to control the avatar throughout the school day (vitality and/or alertness issues).** The socialization and instructional benefits depend on the avatar being in the right place, focused on the appropriate person (the teacher during direct instruction or a peer during conversation). As the avatar is controlled by the student from home, a student who cannot maintain attention to physically direct the avatar throughout the school day could deprive himself of access to classroom instruction and interaction with teacher and peers due to his poor camera work. A webcam system anchored in the classroom or controlled by instructional staff takes away the risk of student error undermining FAPE.

**3) Behavior concerns.** For students who when attending school leave class and wander the halls or students who are otherwise attention-seeking, the robot avatar could be easily misused. For example, consider a variation of the student’s behavior in *Eric H. v. Methacton*, (discussed previously in the context of webcams), and give him a robot avatar instead of a webcam. Not only could he disrupt the classroom, he could also take the disruption to the halls and other locations in the building.

*A final bit of commentary on avatars:* Technological advances create new options for IEP teams as they seek to provide FAPE to students with disabilities confined to the home. While these options should be discussed, the discussion should not ignore the goal of IDEA services to provide meaningful benefit or educational benefit. The FAPE rule tells us that just because a student could benefit from a piece of technology does not mean that the technology is required for FAPE. Instead, the question is whether the student can achieve meaningful benefit without it.

## **F. Transition from home instruction back to school**

**Home instruction is restrictive. So, what are you doing to get the student back to school?** *See for example, Abington, supra.* “Clearly, [due to] Student’s physical/neurological conditions and anxiety, and the many years of instruction in the home, it is not feasible to meet the LRE goal of instruction in a regular classroom, or in any public school placement at present. That does not mean, however, that the District is justified in keeping Student in a very restrictive placement forever. Although the District

expressed a vague aspiration to return Student to school, the District acknowledged that it never considered evaluations or services to address Student's needs in the areas of social skills and anxiety. **It is difficult to understand how the District could have any realistic or reasonable goal for developing a less restrictive placement without addressing any of the significant issues that currently require a very restrictive placement for Student in order to receive even the minimal educational services the District has been providing.**" (Emphasis added.)

*A little commentary:* Put differently, homebound is a very restrictive setting. Consequently, part of the school's focus while providing home instruction ought to be on helping the student return to school. Where there are barriers to the student's return that can be addressed through services or supports (for example, a student's anxiety or phobia can be addressed through counseling or psychological services), the IEP team ought to discuss the provision of those services.

**The need to promptly return or transition a student back to school.** Where an acute or chronic medical condition is the reason for the student's placement on homebound, it seems only rational that when the condition ends, so too does the need for services at home. Assuming that the original homebound placement was appropriate, the LRE considerations that allow a home placement to occur evaporate when the student's condition requiring home services goes away. Just as an inappropriate placement in homebound is problematic, so too is the placement that never ends. "A homebound placement is among the most restrictive placements. On medical grounds, school districts may provide homebound services only when a student is confined to home or hospital for documented medical reasons. Furthermore, when such services are no longer medically necessary, school districts should cease providing them." *Calallen Indep. Sch. Dist.*, 25 IDELR 1017 (SEA TX 1997).

*A little commentary:* Due to the LRE concerns inherent in home instruction, and the inertia that can set in over time with respect to school efforts to return the student to school, schools should consider discussing transition plans and services to return the student to school at the very meeting where home instruction is ordered, and every meeting thereafter until the student is returned.

**A fascinating doctor's response to the question, "When can the student return to school?"** *Bellingham Pub. Schs.*, 41 IDELR 74 (SEA MA 2004). "Dr. Henry stated (in his May 16th submission) that Student would be able to return to a school setting when he 'achieves grade-level work' presumably as a result of home tutoring. This is revealing in that Dr. Henry's opinion is not, ultimately, that any of Student's several diagnoses will keep Student from returning to school, but rather that it is only Student's level of educational proficiency that ultimately will determine his return date.... It seems apparent from his May 16, 2003 submission and January 23, 2004 letter that Dr. Henry believes that Student should be educated through home tutoring because Dr. Henry believes this to be most educationally appropriate for Student. Unfortunately for Parents, Dr. Henry's educational opinions can provide no basis for Bellingham or me to conclude that Student is confined to his home for medical reasons."

**Half-day school placement.** *Windsor (VT) Southeast Supervisory Union #52*, 38 IDELR 195 (OCR 2002). Student's accommodation plan called for half-day attendance for the remainder of the school year due to the student's temporary disability arising from a surgery. Despite the half-day placement, the student wanted to attend full-time and came back to school over the parent's objection. Based on the student's apparent ability to attend and perform full-time, the 504 coordinator informed the parent that it seemed that some of the accommodations (notably half-day attendance) were moot. The parent complained to OCR that the district refused to implement the half-day program. OCR rejected the argument, finding that the school was prepared to implement the half-day program, but that the program simply could not be implemented once the student started attending full-time.

**School phobia and homebound.** *Jason B. v. Floresville Indep. Sch. Dist.*, Nos. 043, 044, 045-SE-1093 (SEA TX 1993). Following an incident on the school bus, the parents of three special education students refused to return them to school, and sought homebound services. The rationale for

homebound was post-traumatic stress disorder, major depression, and school phobia arising from the bus incident. Prior to the next school year, the IEP team met for each of the three, and proposed a transition back to school. The school likewise took other steps to reduce the possibility of a recurrence of trouble on the bus. The students did not return as scheduled, prompting the school's filing for due process and an order that the IEPs were appropriate and proposed services in the LRE. The hearing officer concluded that the IEPs were appropriate and that by keeping their students at home, the parents had "denied the district the opportunity to implement the agreed upon measures." While the parents' concerns were understandable, "a risk-free school environment is neither attainable nor required.... From the Hearing Officer's perspective... depriving children of educational services for such extended periods of time was not in their best interests."

*See also, Bradley v. Arkansas Dep't of Educ.*, 45 IDELR 149, 443 F.3d 965 (8th Cir. 2006)(The IEP team rejected a parent request for homebound on the basis of one-page report from psychologist diagnosing student with school phobia. The team believed that student's socialization needs would not be met at home, and that the home was not the LRE. The school asked for additional information, and the opportunity to pursue a second opinion. Both requests were rejected by the parent who refused to send the student to school. A truancy court ordered the parent to return the student to school. No retaliation found for the truancy filing, as the principal only did what state law required him to do. The principal had actually even delayed filing against the parent in order to try to work out the matter as the principal knew that a truancy filing would further sour the parent-school relationship).

*But see, Greenbush Sch. Cmty. v. Mr. & Mrs. K.*, 25 IDELR 200, 949 F.Supp. 934 (D. Me. 1996)(Student ostracized and persecuted in his resident school system sought placement in a neighboring school system. The District Court found that a student's "gripping fear" of a particular school, together with parental hostility, can prevent a student from receiving educational benefit there, and would make education there inappropriate).

*A little commentary:* An important point made in an Illinois case is that waiting for school phobia to subside is not a good strategy. "In contrast to normal school anxieties which tend to alleviate over time, school phobia becomes worse the longer the individual stays away from school. According to the report it was important to treat Student's school phobia aggressively, with the most immediate goal being to get Student back into the classroom as soon as possible." *Oak Park & River Forest High Sch. Dist. #200*, 34 IDELR 161 (SEA IL 2001).

### **III. A few miscellaneous home instruction issues**

**A. Can a student be too impaired to come to school, but *not too* impaired to participate in a school dance?** *Logan County (WV) Schs.*, 55 IDELR 297 (OCR 2010).

The problem at issue was a policy with no room for individualized determinations. "The Policy categorically denies students who are placed on homebound instruction, including students with a disability who are placed on homebound instruction because of their disability, the opportunity to participate in extracurricular activities." Strangely, the policy prevented attendance at dances and parties, but did not prevent students on homebound from attending basketball and football games "since they are paid events and open to the public." Due to his homebound placement because of Fabry disease (a hereditary metabolic disorder), the student at issue in this complaint was denied the opportunity to participate in the senior party. OCR found this exclusion from participation in extracurricular activities on the basis of disability a Section 504 and ADA violation. The claims continue in federal District Court, where the court refused to dismiss the student's Section 1983 claims. *Mowery v. Logan County Bd. of Educ.*, 58 IDELR 192 (S.D. W.Va. 2012).

*A little commentary:* The case raises a common refrain: If the student is too impaired to come to school, is he not too impaired to go to a senior party/dance? Apparently OCR's take is "not necessarily." The main concern here was the categorical exclusion without any individualized analysis of the student's

unique situation. That said, could the school require that, where a medical professional has opined that for medical reasons the student cannot attend school, a medical professional must therefore provide a release indicating that attending the dance is medically appropriate? And could the school then argue that perhaps some attendance at school is also now appropriate since the student is no longer confined to the home?

On a related issue, the school must have some sort of mechanism to provide notice of extracurricular activities and opportunities to homebound students who will not learn of these events as other students do, i.e., announcements over the intercom or posters in school hallways. *See, for example, Kanawha County (WV) Pub. Schs.*, 112 LRP 7430 (OCR 11/09/11); and *Hernando County (FL) Sch. Dist.*, 56 IDELR 142 (OCR 2010).

## **B. Home instruction as the interim alternative educational setting (IAES) during discipline.**

Under the IDEA, educational services must be provided to the special education student after 10 days of disciplinary removals. 34 C.F.R. §300.530(a)(2). Those services may be provided in an interim alternative educational setting. 34 C.F.R. §300.530(d)(2). The regulations do not provide examples of possible IAESs, but the commentary makes clear that the student's home can be an appropriate IAES. In response to a commenter who sought a ban on the use of home instruction as an IAES, ED wrote:

“Whether a child’s home would be an appropriate interim alternative educational setting under §300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child’s individual needs and educational goals.”

“... care must be taken to ensure that if home instruction is provided for a child removed under § 300.530, the services that are provided will satisfy the requirements for services for a removal under §300.530(d) and section 615(k)(1)(D) of the Act. We do not believe, however, that it is appropriate to include in the regulations that a child’s home is not a suitable placement setting for an interim alternative educational setting as suggested by the commenter.”

“[T]he Act gives the IEP Team the responsibility of determining the alternative setting and we believe the IEP Team must have the flexibility to make the setting determination based on the circumstances and the child’s individual needs.” 71 Fed. Reg. 46,722 (2006).

In a discipline question-and-answer document, OSERS explains that the LEA must have at least one other placement option so the IEP team has a choice. “May a public agency offer ‘home instruction’ as the sole IAES option? Answer: No. ...it would be inappropriate for a public agency to limit an IEP Team to only one option when determining the appropriate IAES.” *Questions & Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).